

COMMONWEALTH OF KENTUCKY
Before the Public Service Commission

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PUBLIC SERVICE
COMMISSION

In the Matter of:

Petition of Doe Valley Utilities, Inc. and)
Doe Valley Association, Inc. for)
Declaration as to Jurisdiction of the Public) CASE NO. 2003-00360
Service Commission, or for Alternative Relief)

MOTION FOR SUMMARY JUDGMENT

Comes now the petitioner, Doe Valley Utilities, Inc. ("DVU"), by counsel, and respectfully moves the Commission to enter an Order granting its petition to be declared a non-jurisdictional utility under KRS Chapter 278. As grounds for the motion, petitioner states as follows:

Factual Background

This action was filed on September 19, 2003 by DVU, seeking a determination by the Commission that DVU is no longer a "public utility" within the jurisdiction of the Commission, based on the fact that DVU serves only a limited number of customers who live outside the Doe Valley subdivision, and that DVU had amended its by-laws to prohibit the extension of services to any additional customers who live outside the development. DVU further requested alternative relief in the event that the Commission found that it was still a jurisdictional public utility. The alternative relief requested was to seek approval for transferring the non-Doe Valley customers to the Meade County

Water District, which has now extended service to the areas in which the non-Doe Valley customers are located.

The Commission's jurisdiction over DVU was originally established in Case No. 92-467, *In the Matter of: The Joint Application of Federal Deposit Insurance Corporation, As Manager of the FSLIC Resolution Fund, and Doe Valley Association, Inc., A Kentucky non-stock non-profit corporation, for the Transfer of the Stock in Doe Valley Utilities, Inc. from Federal Deposit Insurance Corporation to Doe Valley Association, Inc.* In that case, the applicants also sought a determination that DVU was not subject to the jurisdiction of the Commission. The Commission approved the transfer of stock in DVU from the FDIC to Doe Valley Association, but rejected the request to find that DVU was non-jurisdictional. The Commission made the following finding:

In addition to serving the residents of the subdivision, Doe Valley currently provides water service to six nonresidents of the subdivision who own property abutting it, five of whom are residential customers and one of which is an industrial customer. Homeowners associations which provide utility service only to their members as specifically set forth in their by-laws do not fall within the statutory definition of a utility and are thus not within the Commission's jurisdiction. Determining whether service is "to the public" depends of how exclusive or restrictive the membership in the association is. The Association provides service to residents who are not Association members. The Association has not indicated that it will amend its bylaws to include the six nonresidents of the subdivision as members of the association.

Order, Case No. 92-467, December 17, 1992.

The six outside customers of DVU at the time the Commission made this finding in 1992 remain the same six outside customers today. Following the filing of this action, and the initial proceedings, including informal conferences with Commission staff, DVU has undergone a change in composition of board membership. At the informal

conference held on February 6, 2004, DVU notified the Commission of these changes and that its sole shareholder, the Doe Valley Association, had determined that it would be in the best interest of the community to dissolve DVU as a corporate entity, and for the Association to directly assume operational control of the utility services. It was agreed at the informal conference that Doe Valley Association, Inc. would be voluntarily joined as a party, and given an opportunity to take whatever corporate actions were necessary to address the jurisdictional concerns set forth in the Commission's 1992 Order, and those that had been asserted by the Commission staff and intervenors.

Thereafter, Doe Valley Association obtained the signed consent of the five residential outside customers to become Associate Members of the Doe Valley Association. Signed and notarized copies of those consents are attached hereto as Exhibits A and B. Those affidavits confirm that each residential customer has agreed to join the Doe Valley Association, to participate as voting members on the election of directors, and to continue to receive utility services from Doe Valley. The affidavits further confirm that each such customer understands that "the policy of Doe Valley Association is to restrict its service to Members and Associate Members of the Doe Valley Association, and that its services are not, and will not be offered to the general public." All outside residential customers have now indicated their support of this petition for Doe Valley to be removed from the jurisdiction of the Commission.

The one industrial customer, Vulcan Materials Company, has intervened in this action. Vulcan has previously filed testimony in this matter stating its support for Doe Valley to be excluded from the Commission's jurisdiction. *See* Prefiled Testimony of Fred Buckner, 1-16-04.

Following the informal conference of February 6, 2004, Doe Valley Association took a number of corporate actions to implement the decisions set forth at the informal conference. Doe Valley's corporate board has adopted Articles of Dissolution of Doe Valley Utilities, Inc. (Copy attached as Exhibit C). These Articles have a delayed effective date, of April 15, 2004, to allow the Commission to complete its review before the Articles are effective. Doe Valley Association and DVU also adopted a corporate resolution providing that the currently existing outside customers will continue to receive services at the same rates as Doe Valley property owners, and that outside customers will be granted a right to vote to elect board members that will govern utility services, and that all customers will be provided with an internal avenue of appeal on matters related to utility service (Copy attached as Exhibit D). Also attached are the Director's Consent of DVU (Exhibit E), the Shareholder Consent of DVU (Exhibit F), and Articles of Amendment of Doe Valley Association, Inc. (Exhibit G).

The Shareholder Consent has been made "subject to the approval of or determination of non-jurisdiction over the Corporation by the Public Service Commission." The Articles of Amendment now specifically provide that the outside customers "shall have a right to vote for the election of directors that will have jurisdiction over the utilities. Such voting rights shall be the same as any owner of a single lot living within the boundaries of Doe Valley subdivision/development. Said voting rights shall not be modified or eliminated by the by-laws." Accordingly, with the consent of the outside customers, and the Articles of Amendment, all conditions set forth in the Commission's 1992 Order for a determination of non-jurisdiction have been fully implemented. (The Articles of Amendment attached are unsigned, since those

Articles are still subject to a final vote of the shareholders of Doe Valley Association, Inc., which will be held at its next regularly scheduled meeting).

ARGUMENT

The Commission's jurisdiction over public utilities is defined by statute. KRS 278.010(3)(d) provides that the Commission has jurisdiction over utilities that provide "water to, or for the public, for compensation." The Commission's Order in the 1992 case recognized that a homeowner's association that provides water is not subject to Commission jurisdiction, so long as it observes appropriate restrictions on its membership and does not offer its services to the public.

This petition was filed based on DVU's belief that its provision of services to a mere 6 outside customers was *de minimis*, and that so long as services were not offered to the public at large, the Commission should not exercise jurisdiction. The fact that DVU did not extend services to a single outside customer in the 11 years since the 1992 Order provides a strong *prima facie* case that DVU was not offering its services to the public. Moreover, DVU adopted a by-law specifically restricting its services to members of the Doe Valley Association, with the existing 6 outside customers "grandfathered in."

However, since the filing of the petition, the case for finding that Doe Valley's utility services are not within the Commission's jurisdiction has become irrefutable. All five outside residential customers have indicated their agreement to join the property owners' association, and the single industrial customer has filed testimony indicating its agreement and consent that DVU should be considered non-jurisdictional. (Moreover, since Vulcan's water meter and hook up is actually within the boundaries of the Doe

Valley development, it appears that Vulcan should not be considered an outside customer at all).

Both DVU and the Doe Valley Association have not taken all corporate actions necessary to ensure that all terms set forth in the 1992 Order will be implemented, and that water services will be provided only to the membership of the Association. It has been held that a utility is not a public utility subject to state regulation unless "membership is indiscriminately and reasonably made available to the general public." *Marano v. Gibbs*, 45 Ohio St. 3d 310, 544 N.E.2d 635 (1989). Doe Valley, as a matter of law, cannot serve all members of the general public, but has limited its services to residents of the Doe Valley development and its current six outside customers, who have all consented to removing Doe Valley from the Commission's jurisdiction. Doe Valley does not hold itself out to serve the general public. It does not have the powers of a public utility, such as the power of eminent domain. It does not qualify for public grants and loans available to public utilities. In these circumstances, no purpose is served by the continuing exercise of jurisdiction by the Commission.

CONCLUSION

For the reasons stated above, the petitioners request that the Commission enter an Order holding that DVU, and the Doe Valley Association, Inc. (following the dissolution of DVU), is not within the jurisdiction of the Public Service Commission under KRS 278.010, subject to submission to the Commission of an attested copy of the Articles of Amendment attached hereto, after approval by the Doe Valley Association shareholders.

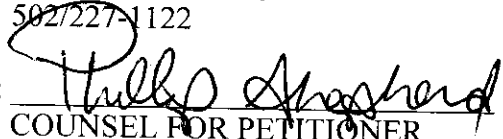
Of counsel:
SHARON HANDY
Borowitz & Goldsmith
Suite 1100, One Riverfront Plaza
Louisville, Kentucky 40202
502/584-7371
(Counsel for Doe Valley Association)

Respectfully submitted,

THOMAS A. MARSHALL
212 Washington Street
P.O. Box 223
Frankfort, Kentucky 40602
502/223-4723

PHILLIP J. SHEPHERD
307 West Main Street
P.O. Box 782
Frankfort, Kentucky 40602
502/227-1122

by:


COUNSEL FOR PETITIONER

Certificate of Service

I hereby certify that a copy of this Motion has been served by first class mail, postage prepaid, on the following counsel of record: Hon. J.R. Goff, Public Service Commission, P.O. Box 615, Frankfort, Kentucky 40602; Hon. Holland McTyeire V, Greenbaum Doll & McDonald, 3300 National City Tower, 101 South Fifth Street, Louisville, Kentucky 40202 (Counsel for Doe Valley Properties, Inc.); and Hon. C. Kent Hatfield, Stoll, Keenon & Park, LLP, Suite 2650, 400 West Market Street, Louisville, Kentucky 40202-3410 (Counsel for Vulcan Materials, Inc.), this 27th day of February, 2004.

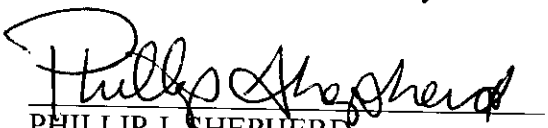

PHILLIP J. SHEPHERD

EXHIBIT A

AFFIDAVIT
PUBLIC SERVICE COMMISSION CASE NO. 2003-00360

Comes now the affiant, Randall C. Benham, after first being duly sworn, and states as follows:

1. I am a customer of Doe Valley Utility, Inc. (DVU), who lives outside the Doe Valley development.
2. I desire to continue my current service from DVU, and I desire for the lake at Doe Valley to continue to be my water source.
3. I have agreed to become an Associate Member of the Doe Valley Association, Inc., with the right to participate as a voting member on the election of the directors who will constitute the board of directors of the utility service.
4. I understand that the Doe Valley Association is the sole shareholder of DVU, and that the Doe Valley Association plans to dissolve (or merge) DVU, so that the Doe Valley Association will be directly responsible for the provision of water and sewer services now provided through DVU.
5. As an Associate Member of the Doe Valley Association, I will be assured of continued services from DVU or its successor, and I will have the right to participate in the election of Doe Valley Association directors to protect my rights to such services.
6. I understand that the policy of the DVU and the Doe Valley Association is to restrict its services to Members and Associate Members of the Doe Valley Association, and that its services are not, and will not, be offered to the general public.
6. Based on the foregoing, I support the petition of DVU to be removed from the jurisdiction of the Kentucky Public Service Commission.


RANDALL C. BENHAM

Subscribed and sworn to or affirmed before me, a notary public.


NOTARY PUBLIC, STATE-AT-LARGE

My Commission expires:

9/26/04

EXHIBIT B

**AFFIDAVIT
PUBLIC SERVICE COMMISSION CASE NO. 2003-00360**

Come now the affiants, Edie D. Jones, Edith M. Harrington, Charles W. and C. J. (Judy) Russell, and John E. and Sharon C. Jones, and states as follows:

1. We are customers and future customers of Doe Valley Utility, Inc. (DVU), who are not Doe Valley property owners.
2. We desire to continue our current service from DVU, and we desire for the lake at Doe Valley to continue to be our water source.
3. We have agreed to become Associate Members of the Doe Valley Association, Inc., with the right to participate as voting members on the election of the directors who will constitute the board of directors, which will govern the utility service.
4. We understand that the Doe Valley Association is the sole shareholder of DVU, and that the Doe Valley Association has dissolved or merged DVU, so that the Doe Valley Association will be directly responsible for the provision of water now provided through DVU.
5. As Associate Members of the Doe Valley Association, we will be assured of continued services from Doe Valley Association, and we will have the right to participate in the election of Doe Valley Association Directors to protect our rights to such services.
6. We understand that the policy of the Doe Valley Association is to restrict its services to Members and Associate Members of the Doe Valley Association, and that its services are not, and will not be offered to the general public, (Present and future owners of the Harrington Estates shall be included as Associate Members).
7. Based on the foregoing, we support the petition of Doe Valley Association to be removed from the jurisdiction of the Kentucky Public Service Commission.
8. We the undersigned realize that this affidavit is only at statement of our desire to continue services with Doe Valley Association and is in no way a binding contract.

Edie D. Jones
Edie D. Jones

Edith M. Harrington
Edith M. Harrington

Charles W. Russell
Charles W. Russell

C. J. (Judy) Russell
C. J. (Judy) Russell

Sharon C. Jones
Sharon C. Jones

Subscribed and sworn to or affirmed before me, a notary public.

Kirsten Smith
NOTARY PUBLIC, STATE -AT-LARGE

My Commission expires: _____

MY COMMISSION EXPIRES 3/11/2007

Joe M. Hager
Joe M. Hager, President
Doe Valley Utilities

EXHIBIT C

ARTICLES OF DISSOLUTION
OF
DOE VALLEY UTILITIES, INC.

Pursuant to the applicable provisions of Subtitle 14 of Chapter 271B of the Kentucky Revised Statutes, the undersigned, being the sole shareholder of Doe Valley Utilities, Inc., a Kentucky corporation ("**Corporation**"), sets forth the following articles of dissolution for such corporation:

ARTICLE I

The name of the Corporation is **Doe Valley Utilities, Inc.**

ARTICLE II

The Corporation's dissolution was authorized by the board of directors on the date hereof and the board recommended its submission to shareholders at a special meeting.

ARTICLE III


At a special meeting of the shareholders, there were one thousand (1,000) votes entitled to be cast on the proposal to dissolve the Corporation and wind up its business affairs. The proposal was approved in a written consent signed by all of the Corporation's shareholders, having the effect of a unanimous vote in favor of the dissolution proposal at the shareholders' meeting. Accordingly, one thousand (1,000) votes were cast for the proposal and zero (0) votes were cast against the proposal. Voting by shareholder groups was not required. The votes by all of the shareholders were sufficient for approval.

ARTICLE IV





The effective date for these Articles of Dissolution and the Corporation's voluntary dissolution shall be April 15, 2004.

In witness whereof this 26 day of February, 2004.

DOE VALLEY ASSOCIATION, INC.



JUDI DEPPEN


TONY GOLLADAY

ROBERT STEUART

MIKE CAMPBELL

JOE HAGER

The foregoing document was prepared by:

BOROWITZ & GOLDSMITH, PLC

SHARON R. HANDY
401 West Main Street, Suite 1100
Louisville, KY 40202
502-584-7371

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EXHIBIT D

CORPORATE RESOLUTION
BOARD OF DIRECTORS OF
DOE VALLEY ASSOCIATION, INC.
DOE VALLEY UTILITIES, INC.

At a regular meeting of the Board of Directors of Doe Valley Association, Inc., and Doe Valley Utilities, Inc. on February 26, 2004, the following resolutions were approved by the Board of Directors:

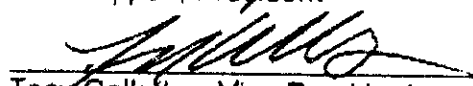
RESOLVED, that the Doe Valley Utility Board or the Doe Valley Association, Inc., shall continue to provide water to the outside customers at the same rate as the Doe Valley property owners as long as the outside customers need water and as long as Doe Valley Utilities or Doe Valley Association, Inc. is providing water;

RESOLVED FURTHER, that the same outside customers would be granted a right to vote, as water customers, in the election of the board of directors that will have jurisdiction over the utilities;

RESOLVED FURTHER, that a method will be devised for an avenue of appeal for all utility users in the event Doe Valley Utilities is no longer under the jurisdiction of the Public Service Commission.

DOE VALLEY ASSOCIATION, INC.


Judi Deppen, President


Tony Golladay, Vice President


Robert Steuart, Secretary

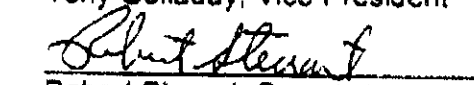

Mike Campbell, Treasurer


Joe Hager, Director at Large

DOE VALLEY UTILITIES, INC.


Joe Hager, President


Tony Golladay, Vice President


Robert Steuart, Secretary


Mike Campbell, Treasurer


Judi Deppen, Director at Large

EXHIBIT E

DIRECTORS' CONSENT
OF
DOE VALLEY UTILITIES, INC.

The undersigned, being all the directors of Doe Valley Utilities, Inc. ("**Corporation**"), hereby take the following corporate action by consent:

WHEREAS, in the judgment of the Board of Directors, it is deemed advisable and for the benefit of the Corporation that it should be completely liquidated and dissolved effective as of February 26, 2004;

NOW THEREFORE, BE IT RESOLVED that the Board of Directors hereby recommends to the shareholder of the Corporation to voluntarily liquidate and dissolve the Corporation effective as of February 26, 2004, in accordance with Chapter 271B of the Kentucky Revised Statutes. If approved by the shareholder of the Corporation, the Board of Directors of the Corporation is authorized and directed to take any and all steps necessary to liquidate and dissolve the Corporation, including winding up the Corporation's business and affairs and disposing of known claims as required by law.

This consent shall be filed with the minutes of the Corporation.

Dated the 26 day of February, 2004.

DOE VALLEY ASSOCIATION, INC.



JUDI DEPPEN, Director



TONY GOLLADAY, Director



ROBERT STEUART, Director



MIKE CAMPBELL, Director



JOE HAGER, Director

EXHIBIT F

SHAREHOLDER CONSENT
OF
DOE VALLEY UTILITIES, INC.

The undersigned, being the sole shareholder of Doe Valley Utilities, Inc. ("**Corporation**"), hereby takes the following corporate action by consent:

WHEREAS, the Board of Directors of the Corporation has given its unconditional recommendation that the Corporation be completely liquidated and dissolved effective as of February 26, 2004, in accordance with Chapter 271B of the Kentucky Revised Statutes;

WHEREAS, it is deemed advisable and for the benefit of the Corporation for it to be completely liquidated and dissolved;

NOW THEREFORE, BE IT RESOLVED that unanimous shareholder approval is hereby given for the voluntary dissolution of the Corporation as recommended by the Board of Directors, subject to the approval of or determination of no-jurisdiction over the Corporation by the Public Service Commission.

This consent shall be filed with the minutes of the Corporation.

Dated the 26 day of February, 2004.

DOE VALLEY ASSOCIATION, INC.



JUDI DEPPEN, Director



TONY COLLADAY, Director



ROBERT STEUART, Director



MIKE CAMPBELL, Director



JOE HAGER, Director

EXHIBIT G

**ARTICLES OF AMENDMENT
OF
DOE VALLEY ASSOCIATION, INC.**

ARTICLE I: NAME

The name of the Corporation is "Doe Valley Association, Inc."

Article IV: REGISTERED OFFICE is hereby amended in its entirety to read as follows:

ARTICLE IV: REGISTERED OFFICE

The registered office of the Corporation shall be One Doe Valley Parkway, Brandenburg, Kentucky 40108, which office may be changed from time to time by resolution of the board of directors of the Corporation. Any officer of the Corporation is authorized to sign and file notice of any board approved change in the Corporation's registered office with the Secretary of State of the Commonwealth of Kentucky.

Article V: REGISTERED AGENT is hereby amended in its entirety to read as follows:

ARTICLE V: REGISTERED AGENT

The registered agent of the Corporation shall be the person serving as president of the Corporation from time to time, during his or her term of office. Accordingly, Judi Deppen, shall be the registered agent of the Corporation upon adoption of these Articles of Amendment and shall continue to serve as such during her term of office as president of the Corporation. Any officer of the Corporation is authorized to sign and file notice of the change in registered agent with the Secretary of State of the Commonwealth of Kentucky from time to time.

Article VI: DIRECTORS is hereby amended in its entirety to read as follows:

ARTICLE VI: DIRECTORS

- (a) The Corporation shall be governed by a board of directors. The number, qualifications, terms, manner of voting, and manner of election shall be prescribed in, and may be changed by amendment to, the by-laws, provided however that to the extent the Corporation continues to provide water to the 6 customers it currently has that live outside the boundaries of Doe Valley subdivision/development, such water customers shall have a right to vote for the election of

directors that will have jurisdiction over the utilities. Such voting rights shall be the same as any owner of a single lot living within the boundaries of Doe Valley subdivision/development. Said voting rights shall not be modified or eliminated by the by-laws.

- (b) The board of directors shall provide an avenue of appeal for all utility users it sells water to in the event Doe Valley Association, Inc. is determined to not be under the jurisdiction of the Public Service Commission.
- (c) The Corporation shall continue to provide water to the 6 outside customers at the same rate as the Doe Valley property owners as long as the outside customers need water and as long as Doe Valley Association, Inc. is providing water.

ARTICLE VII is hereby amended in its entirety to read as follows:

ARTICLE VII: DIRECTOR LIABILITY

- (a) In accordance with KRS 273.215, each director shall discharge his/her duties as a director, including his/her duties as a member of a committee in good faith, on an informed basis, and in a manner he/she honestly believes to be in the best interests of the Corporation.
- (b) As allowed by KRS 273.248, except for any act or omissions occurring prior to the adoption of these Articles of Amendment, a director shall not have personal liability to the Corporation for monetary damages for breach of his/her duties as a director, provided that there shall be no limitation or elimination of the liability of a director:
 - 1. For any transaction in which the director's personal financial interest is in conflict with the financial interests of the Corporation;
 - 2. For acts or omissions not in good faith or which involve intentional misconduct or are known to the director to be a violation of law; or
 - 3. For any transaction from which the director derived an improper personal benefit.

The foregoing amendments to the Articles of Incorporation of Doe Valley Association, Inc. (the "Corporation" or "POA") were proposed by resolution of the board of directors of the Corporation, and submitted to a vote at a special

IN TESTIMONY WHEREOF witness the hand of the board of directors of the Corporation this _____ day of _____, 2004.

Joe Hager, Director at Large

COMMONWEALTH OF KENTUCKY)
) SS.
COUNTY OF MEADE)

NOTARY PUBLIC, State at Large, KY